

NO. 48795-1-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JENNIFER WALKER,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR COWLITZ COUNTY

The Honorable Michael Evans, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
C. STATEMENT OF THE CASE.....	2
1. <u>Procedural facts</u>	2
a. <u>CrR 3.5 hearing</u>	3
2. <u>Trial testimony</u>	4
D. <u>ARGUMENT</u>	8
1. <u>THERE IS INSUFFICEINT EVIDENCE TO SUSTAIN MS. WALKER CONVICTION FOR INJURY HIT AND RUN</u>	8
2. <u>MS. WALKER DID NOT RECEIVE OF EFFECTIVE ASSISTANCE OF COUNSEL BY DUE TO TIRAL COUNSEL'S FAILURE TO CALL A CRITICAL WITNESS</u>	10
a. <u>Defense Counsel was ineffective by failing to call Don Ortmann as a witness</u>	11
b. <u>Defense counsel was ineffective by failing to propose a missing witness instruction.</u>	13
c. <u>Ms. Walker was prejudiced by counsel's deficient performance.</u>	14
E. CONCLUSION.....	15

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Bencivenga</i> , 137 Wn.2d 703, 974 P.2d 832 (1999)	9
<i>State v. Craven</i> , 67 Wn. App. 921, 841 P.2d 774 (1992)	8
<i>State v. Davis</i> , 73 Wash.2d 271, 438 P.2d 185 (1968).....	14
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	8
<i>State v. Hartley</i> , 51 Wn App. 442, 754 P.2d 131 (1988).....	11
<i>State v. Jury</i> , 19 Wn. App. 256, 576 P.2d 1302 (1978)	11
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	10
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	8
<i>State v. Smith</i> , 56 Wn.2d 368, 353 P.2d 155 (1960)	11
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	10
<i>State v. Weaver</i> , 60 Wn.2d 87, 371 P.2d 1006 (1962).....	9
 <u>UNITED STATES CASES</u>	 <u>Page</u>
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....	14
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).....	14
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	10
 <u>REVISED CODE OF WASHINGTON</u>	 <u>Page</u>
RCW 46.20.020	3
 <u>CONSTITUTIONAL PROVISIONS</u>	 <u>Page</u>
Wash. Const. art. I, § 22.....	1
United States Const., Sixth Amendment.....	1

A. ASSIGNMENTS OF ERROR

1. Appellant Jennifer Walker's conviction for felony hit and run must be vacated due to lack of sufficiency of the evidence.

2. Ms. Walker was deprived of her right to effective assistance of counsel due to the failure of her trial attorney to call or subpoena critical a witness, contrary to her right to effective representation under the United States Constitution, Sixth Amendment, and art. 1, § 22 of the Washington Constitution.

3. Ms. Walker was deprived of her right to effective assistance of counsel due to the failure of her trial attorney to propose a missing witness instruction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The defense at trial was that Ms. Walker was not the driver of a Ford F-250 pickup truck which collided with another vehicle, in which the driver of the F-250 truck left the scene without providing identifying information to the other driver, who was injured as a result of the accident. Should Ms. Walker's conviction for felony hit and run be dismissed with prejudice due to insufficient evidence that she was the driver of the F-250 and that insufficient evidence that she committed the offense? (Assignment of Error 1)

2. A claim for ineffective assistance of counsel requires the appellant to show that the attorney's performance fell below an objective standard of reasonableness and that this deficiency resulted in prejudice to the

appellant. Defense counsel failed to subpoena or call a critical witness at trial. Did defense counsel's omission violate Ms. Walker's right to effective assistance of counsel? (Assignment of Error 2)

3. Having failed to call the critical witness defense at trial, Ms. Walker's counsel also failed to propose a missing witness instruction. Did this omission violate Ms. Walker's right to effective assistance of counsel? (Assignment of Error 3)

C. STATEMENT OF THE CASE

1. Procedural facts:

Sergeant Brad Gillaspie of the Woodland Police Department was dispatched to investigate a two vehicle collision on Lewis River Road in Woodland, Washington at approximately 3:30 p.m. on September 17, 2015. Report of Proceedings¹ (RP) at 179. After arriving on the scene, Sgt. Gillaspie learned that a blue 1972 Ford F-250 pickup truck collided in the oncoming lane of travel with a pickup driven by Dan Toste while going around a corner on the Lewis River Road. RP at 179-80. The driver of the F-250, which was stopped in the roadway, approached the Mr. Toste while he was in his truck, but did not remain at the scene of the accident when police

¹ The record of proceedings consists of three volumes, which are designated as follows: RP—September 28, 2015, October 13, 2015, December 14, 2015, January 21, 2016, February 16, 2016 (sentencing), February 23, 2016 (sentencing continued), March 1, 2016, and March 8, 2016; RP---Volume A, January 28, 2016, (*voir dire*, CrR 3.5 suppression

arrived. RP at 183-84. John Ortman, an occupant of the F-250, was standing by the truck when police arrived. RP at 183. Mr. Ortman told Sgt Gillaspie that Jennifer Walker was the driver of the F-250 and that he was a passenger. RP at 186. Police searched the area but were unable to find any person matching Ms. Walker's description. RP at 184.

Ms. Walker was charged in the Cowlitz County Superior Court on September 30, 2016 with one count of felony hit and run.² Clerk's Papers (CP) 3-4. The State amended the information on October 2, 2015 to add violation of RCW 46.52.020(4)(b) to the State's allegation in the information. CP 6-7. Appendix A.

a. CrR 3.5 hearing

The morning of trial the court conducted a suppression hearing regarding statements Ms. Walker allegedly made to Woodland Police Officer Brent Murray at the time of her arrest on September 26, 2015. RP at 118-128. Officer Murray stated that she contacted Ms. Walker in the basement of a house located in Woodland belonging to Tim Blanchard on September 26, 2016. RP at 119. The officer placed Ms. Walker under arrest pursuant to a warrant, handcuffed her

hearing, jury trial); and RP --Volume B, January 28, 2016, (jury trial).

²RCW 46.52.020(1)(4)(b).

and read Ms. Walker her *Miranda*³ warnings. RP at 121. He stated that Ms. Walker said that she understood her rights. According to the officer, Ms. Walker stated that she was not the driver of the truck and that on the day of the accident she rode with Mr. Ortman and another woman in the truck, and that the other woman was the driver. RP at 124. Officer Murray stated that Ms. Walker said that she did not know the woman's name and could not provide any identifying information. RP at 124. Defense counsel did not offer argument in opposition to admission of the statements. RP at 126. The court found that Ms. Walker's statements were admissible. RP at 128. Findings and conclusions were entered on February 16, 2016. CP 42-43.

2. Trial testimony:

The matter came on for jury trial on January 28, 2016, the Honorable Michael Evans presiding.

Richard Keen is the owner of a 1972 Ford F-250 pickup that was involved in the collision with Mr. Toste's truck. RP at 139. Mr. Keen normally parks the truck in front of the house of Tim Blanchard and leaves the keys in the truck ignition and permits other people to move the truck in the event they need to load or unload material at the house. RP at 141. The truck was driven on September 17, 2015, but he did not see who was driving it because he was asleep at the time it was borrowed. RP at 142. Mr. Keen was

³*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

told later that day that the truck was involved in an accident approximately a mile and a half from the Blanchard house. RP at 142. He went to the scene where he saw John Ortman in his now-wrecked F-250. RP at 142.

Mr. Keen denied that he told the police that he loaned the truck to Ms. Walker. RP at 143-44. He stated that Mr. Ortman was in the truck cab when he arrived and that he "did not know who really was driving it at that time." RP at 145.

Jeffrey O'Brien-Wile was working in the garage of his residence located on the Lewis River Road on September 17, 2016. RP at 147. He heard the sound of screeching tires, went outside and saw a woman driving an older model blue pickup truck with a man in the passenger seat. RP at 147. The blue truck had hit a newer model green pickup, partially knocking the green truck into his yard. RP at 147. He motioned for the driver of the green truck to drive onto his property in order to clear the roadway, and then went to check on the occupants of the blue truck. RP at 148, 149, 157. The F-250 was still running and was in the middle of the road. RP at 155. After checking on the occupants of the truck, who said that they were okay, he returned to the green truck and checked on the driver, Daniel Toste. RP at 150.

Mr. Toste's truck sustained damage to the front and driver's side, and windows on the driver's side were broken. RP at 167. Mr. Toste had lacerations on his arm from broken window glass and was bleeding. RP at

151. Mr. O'Brien-Wile helped Mr. Toste out of the passenger side door because the driver side door was damaged and could not be opened. RP at 151. He then returned to the other vehicle and noted that the woman was gone. RP at 158. The man in the truck said that she had left to go to the restroom. RP at 151, 158.

Mr. O'Brien-Wile told the police that a woman was the driver of the blue truck but that he did not know her name. RP at 158. In court, Mr. O'Brien-Wile identified Ms. Walker as the woman who was driving the F-250. RP at 150.

Mr. Toste stated that while on the Lewis River Road, an early model F-250 fishtailed on a corner, overcorrected and then came into his lane and hit his truck. RP at 166. The front and right side of his truck were damaged and the driver's side window and cab window were both shattered. RP at 167. After he got out of the truck he realized that he had blood running from his left arm. RP at 168. After his vehicle stopped he saw a female get out of the F-250. She approached his truck and asked if he was okay. RP at 169. He stated that the woman's demeanor was "casual" and that she "was kind of chuckling or giggled as she was approaching" his truck. RP at 169. He stated that the woman wanted to exchange information. RP at 170. He said that after he got out of the truck he said that he would have to call the police. RP at 170. Mr. Toste stated that he called 911 and did not see the woman after that. RP at 171. He did not know the identity of the woman; and stated that she did not

give him her name, name of her insurance company, address, and did not now show her driver's license. RP at 170, 175. In court he identified Ms. Walker as the driver of the truck. RP at 168.

Sgt. Gillaspie arrived approximately fifteen minutes after the collision and spoke with Mr. Toste, Mr. O'Brien-Wile, and Mr. Ortman. RP at 183. Mr. Keen arrived at the scene shortly thereafter. RP at 183. Several other officers arrived and they searched the immediate area for the woman who was identified as the driver, but no such person was located. RP at 184. Sgt. Gillaspie stated that the name Jennifer Walker was provided by Mr. Ortman as the driver. RP at 185.

Officer Murray went to the Blanchard residence on September 26, 2015 while searching for Ms. Walker. RP at 197. Mr. Blanchard permitted the officer to enter the basement of the house, which was partitioned into several living areas by suspended blankets. RP at 198, 199. Officer Murray located Ms. Walker and arrested her on a warrant and told her that he was investigating a hit and run accident. RP at 199. She denied being involved in a hit and run and stated that she had been in a truck with Mr. Ortman that day, and that another woman was driving. RP at 199.

Ms. Walker testified that she was at Mr. Blanchard's house on September 17, 2015. RP at 212. Mr. Ortman asked to borrow Mr. Keen's truck, and she, Mr. Ortman, and Lexi, a friend of Mr. Ortman's, left in the truck. RP at 212, 213. Lexi drove them to a friend's house, where they let out

Ms. Walker and then proceeded toward Woodland. RP at 214. She stated that she was not in the truck at the time of the accident and did not know what happened. RP at 214.

She stated that she was later contacted by Mr. Ortman, who told her that she was implicated in a hit and run accident. RP at 215. She stated that she called the Woodland Police Department and left a message to call her back, but that she did not receive a return call. RP at 216.

The jury found Ms. Walker guilty of felony hit and run as charged. RP at 255; CP 39. The court sentenced Ms. Walker within the standard range. RP (2/23/16) at 34; CP 46-57.

Timely notice of appeal was filed on March 8, 2016. CP 62. This appeal follows.

D. ARGUMENT

1. THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN MS. WALKER'S CONVICTION FOR INJURY HIT AND RUN

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, at 201; *State v. Craven*, 67 Wn. App. 921, 928,

841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, at 201; *Craven*, at 928.

In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rational trier of fact to find guilt beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (citing *State v. Weaver*, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

To convict Ms. Walker of injury hit and run under RCW 46.20.020, the State, in part, had the burden to prove beyond a reasonable doubt that Ms. Walker was the driver of the truck involved in the accident, that she knew of the accident and that she failed to stop and return or remain at the scene to provide the required information and reasonable assistance. The State failed to carry its burden in this regard.

Although Mr. Toste and Mr. O’Brien-Wile identified Ms. Walker as the driver of the F-250 in the courtroom, both witnesses had only momentary

contact with her on September 17, 2015, and did not otherwise know Ms. Walker. The claim that Ms. Walker was the driver originated from Mr. Ortman, who did not testify at trial and, if he was the actual driver, would have had a strong motive to allege that it was Ms. Walker who was the driver.

The physical evidence is even less compelling. Mr. Keen, the truck's owner, did not testify that he saw Ms. Walker take the vehicle, and in fact stated that he was asleep at the time the truck was taken. RP at 140. Moreover, Mr. Ortman did not testify. No video, camera phone, or other form of photographic evidence was introduced showing Ms. Walker at the scene or walking away from the scene, despite the ubiquity of camera phones and surveillance cameras in almost all public areas.

The evidence against Ms. Walker constitutes nothing more than the pyramiding of inferences condemned in *State v. Bencivenga, supra*. The State failed to establish sufficient evidence that Ms. Walker was at the scene, let alone the driver of the truck involved in the accident.

2. **MS. WALKER DID NOT RECEIVE OF EFFECTIVE ASSISTANCE OF COUNSEL DUE TO TRIAL COUNSEL'S FAILURE TO CALL A CRITICAL WITNESS.**

In order to prevail on a claim of ineffective assistance, a defendant must show: (1) that his or her lawyer's performance fell below an objective

standard of reasonableness, and (2) that there is a reasonable probability that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. For an ineffective assistance of counsel claim to succeed, the defendant must show that the attorney’s conduct was not a legitimate trial strategy or tactic. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)

a. Defense counsel was ineffective by failing to call Dan Ortman as a witness.

The affidavit of probable cause states that Dan Ortman was a passenger in the pickup truck. Ms. Walker told officer Murray that she was in the truck with Mr. Ortman and that there was another woman driving. RP at 199. At trial Ms. Walker testified that Mr. Ortman wanted to borrow Mr. Keen’s truck, and that she, Mr. Ortman, and a friend of Mr. Ortman’s named Lexi all drove to a friend’s house, where Mr. Ortman and Lexi dropped her off. RP at 213-14. She testified that Mr. Ortman subsequently told her that had “been implicated in a hit and run” and that she was supposed to call the Woodland Police Department. RP at 215. Officer Gillaspie stated that Dan Ortman was one of two people

who alleged that Ms. Walker was the driver of the truck at the time of the collision. RP at 185-86. However, defense counsel failed to call Mr. Ortman as a witness.

This Court has held that failure to interview and subpoena witnesses constituted ineffective assistance of counsel. *State v. Jury*, 19 Wn. App. 256, 264-65, 576 P.2d 1302 (1978). See also *State v. Smith*, 56 Wn.2d 368, 370, 353 P.2d 155 (1960) (failure to cause subpoena to issue clearly constitutes lack of due diligence); *State v. Hartley*, 51 Wn App. 442, 445-46, 754 P.2d 131 (1988) (defense counsel who did not make timely use of legal mechanisms to compel witness's attendance did not exercise due diligence).

Here, Mr. Ortman's presence was critical because he was the initial source of the allegation that Ms. Walker was the driver. Without the ability to examine him, the defense was utterly unable to rebut the initial "identification" of Ms. Walker as the driver.

Given counsel's failure to bring Mr. Ortman into court, this failure could not have been tactical, since it left the defense with no ability to challenge the initial identification. Moreover, the failure to call Mr. Ortman essentially neutered the defense's ability to challenge Mr. Ortman's potential motive for falsely accusing Ms. Walker of being the driver. Had he been called as a witness and if Mr. Ortman testified—as could be expected—that Ms. Walker was the

driver, his testimony could have been challenged on any number of reasons for falsely accusing her, including the fact that he had a suspended driver's license. RP at 185.

Having been provided with discovery and the probable cause statement, defense counsel should have been aware of the need to subpoena Mr. Ortman before trial in order to effectively challenge his identification of Ms. Walker as the driver.

Defense counsel attempted to capitalize on Mr. Ortman's absence and elicited testimony from Officer Gillaspie that his license was suspended, but there could be no substitute for Mr. Ortman's actual testimony. While the State was content to accept Mr. Ortman's allegation that she was driver only cross-examination of Mr. Ortman could reliably establish reasons why he would make a false accusation.

b. Defense counsel was ineffective by failing to propose a missing witness instruction.

Having failed to procure Mr. Ortman's testimony, defense counsel was obligated, at the least, to propose a missing witness instruction. The defense theory is that the State could not prove beyond a reasonable doubt that Ms. Walker was the driver and that the driver could have been Mr. Ortman. During closing, defense counsel argued to the jury,

[T]here's not proof beyond a reasonable doubt that it was Jennifer Walker, the one who they have gotten here charged with this crime, because the officers who weren't there at the scene to see what happened got the word from John Ortman, and presumably from Richard Keen, who tells you today he had no idea who was there. He was told by John Ortman.

So John Ortman, who the person who was in the car could've been driving. With the driver of that vehicle, and according to Jennifer, the third person in this truck, should be here to be able to be asked those questions and tell you directly, since he's the one who gave everybody the name Jennifer Walker, and he's the missing ingredient you don't have. He's the one we can't cross-examine. He's the one who we can't deal with this at all about, and we're hanging this whole thing on her without the one person who knows who she is.

RP at 243-44.

A missing witness instruction tells the jury that it may draw an inference that the testimony of the missing witness would have been unfavorable to the party in the case. *State v. Davis*, 73 Wash.2d 271, 276, 438 P.2d 185 (1968). One of the prerequisites for a missing witness instruction is that the witness is either within the control of the adverse party or is "peculiarly" available to that party. *Montgomery*, 163 Wn.2d at 598-99, 183 P.3d 267. Here, Mr. Ortman was interviewed by Officer Gillaspie, who presumably obtained Mr. Ortman's contact information. RP at 183.

Because the actions of counsel were unreasonable, his failure to subpoena Mr. Ortman or request a missing witness instruction cannot be construed as

merely a tactical decision. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 1037, 145 L.Ed.2d 985 (2000).

c. Ms. Walker was prejudiced by counsel's deficient performance.

The cumulative effect of counsel's errors was highly prejudicial to Ms. Walker. By failing to call Mr. Ortman to testify, counsel effectively deprived Ms. Walker of her right, under the Sixth Amendment of the United States Constitution and Article I, section 22 of the Washington Constitution, to confront his accusers.⁴

The witness was necessary to explain how Ms. Walker name initially emerged in the case, and reasons why Mr. Ortman would have to suggest she was driving even if she was not the driver. Without this testimony, Ms. Walker was unable to effectively challenge the State's theory that she was the driver of the truck.

The failure to call Mr. Ortman, combined with the failure to propose a missing witness instruction, also violated his right to present a defense. The defense theory of the case was that Ms. Walker was not the driver, as she testified. Mr. Ortman was the person who said that Ms. Walker was the driver.

⁴The Sixth Amendment of the United States Constitution provides a criminal defendant the right "to be confronted by the witnesses against him." Article 1, section 22 of the Washington Constitution provides "the right . . . to meet the witnesses against him face to face."

Without the evidence of possible reasons why Mr. Ortman would name her as the driver, and without the ability to weigh Mr. Ortman's credibility, or in the alternative the missing witness instruction, the defense theory could not be fleshed out.

Ms. Walker's conviction should therefore be reversed.

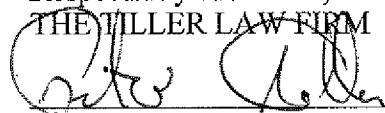
E. CONCLUSION

Based on the above, Ms. Walker respectfully requests this court to reverse and dismiss her conviction consistent with the arguments presented herein.

DATED: September 21, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

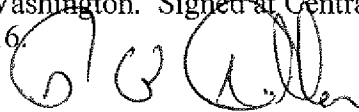
The undersigned certifies that on September 21, 2016, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on September 21, 2016.



PETER B. TILLER

APPENDIX A
RCW 46.52.020

Duty in case of personal injury or death or damage to attended vehicle or other property—Penalties.

(1) A driver of any vehicle involved in an accident resulting in the injury to or death of any person or involving striking the body of a deceased person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to, and in every event remain at, the scene of such accident until he or she has fulfilled the requirements of subsection (3) of this section; every such stop shall be made without obstructing traffic more than is necessary.

(2)(a) The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person or damage to other property must move the vehicle as soon as possible off the roadway or freeway main lanes, shoulders, medians, and adjacent areas to a location on an exit ramp shoulder, the frontage road, the nearest suitable cross street, or other suitable location. The driver shall remain at the suitable location until he or she has fulfilled the requirements of subsection (3) of this section. Moving the vehicle in no way affects fault for an accident.

(b) A law enforcement officer or representative of the department of transportation may cause a motor vehicle, cargo, or debris to be moved from the roadway; and neither the department of transportation representative, nor anyone acting under the direction of the officer or the department of transportation representative is liable for damage to the motor vehicle, cargo, or debris caused by reasonable efforts of removal.

(3) Unless otherwise provided in subsection (7) of this section the driver of any vehicle involved in an accident resulting in injury to or death of any person, or involving striking the body of a deceased person, or resulting in damage to any vehicle which is driven or attended by any person or damage to other property shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided with and shall render to any person injured in such accident reasonable assistance, including the carrying or the making of arrangements for the carrying of such person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person or on his or her behalf. Under no circumstances shall the

rendering of assistance or other compliance with the provisions of this subsection be evidence of the liability of any driver for such accident.

(4)(a) Any driver covered by the provisions of subsection (1) of this section failing to stop or comply with any of the requirements of subsection (3) of this section in the case of an accident resulting in death is guilty of a class B felony and, upon conviction, is punishable according to chapter 9A.20 RCW.

(b) Any driver covered by the provisions of subsection (1) of this section failing to stop or comply with any of the requirements of subsection (3) of this section in the case of an accident resulting in injury is guilty of a class C felony and, upon conviction, is punishable according to chapter 9A.20 RCW.

(c) Any driver covered by the provisions of subsection (1) of this section failing to stop or comply with any of the requirements of subsection (3) of this section in the case of an accident involving striking the body of a deceased person is guilty of a gross misdemeanor.

(d) This subsection shall not apply to any person injured or incapacitated by such accident to the extent of being physically incapable of complying with this section.

(5) Any driver covered by the provisions of subsection (2) of this section failing to stop or to comply with any of the requirements of subsection (3) of this section under said circumstances shall be guilty of a gross misdemeanor: PROVIDED, That this provision shall not apply to any person injured or incapacitated by such accident to the extent of being physically incapable of complying herewith.

(6) The license or permit to drive or any nonresident privilege to drive of any person convicted under this section or any local ordinance consisting of substantially the same language as this section of failure to stop and give information or render aid following an accident with any vehicle driven or attended by any person shall be revoked by the department.

(7) If none of the persons specified are in condition to receive the information to which they otherwise would be entitled under subsection (3) of this section, and no police officer is present, the driver of any vehicle involved in such accident after fulfilling all other requirements of subsections (1) and (3) of this section insofar as possible on his or her part to be performed, shall forthwith report such accident to the nearest office of the duly authorized police authority and submit thereto the information specified in subsection (3) of this section.

TILLER LAW OFFICE

September 21, 2016 - 4:58 PM

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